Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-889

PHYLLIS ANN SMITH,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 23704

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704
Counsel for Petitioner

Anthony Troy, Acting Attorney General
Commonwealth of Virginia
Virginia State Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
Counsel for Respondent

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Phyllis Ann Smith, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of Virginia, made on September 8, 1977, which affirmed the decision made by the trial Court.

OPINIONS BELOW

The Supreme Court of Virginia's opinion decided on September 8, 1977, is appended hereto in the appendix. The Supreme Court of Virginia did not write a formal opinion.

JURISDICTION

The order sought to be reviewed is the September 8, 1977, decision. No petition for rehearing was made nor was any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction in this Court to review the judgment in question is 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of the equal protection of the laws or due process of the law, or both, for the Virginia State Court to take the view that a husband can violate his estranged wife's property rights without impunity, thus denying her the right to defend her property from invasion by the husband?

2. Whether the instruction on the applicable Virginia statute regarding the use of a firearm was a violation of the double jeopardy guarantee?

STATUTE INVOLVED

There are no statutes directly involved.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL PROCEEDINGS

Phyllis Ann Smith (hereinafter referred to as the defendant) was indicted for the murder of Fred A. Smith, her estranged husband, and for using a firearm during the commission of said murder. On November 16, 17 and 18, 1976, she was tried before a jury and the Honorable Robert F. McMurran, the Chief Judge of the Circuit Court of the City of Portsmouth, Virginia.

After the presentation of the evidence and argument, the jury returned its verdicts finding the defendant guilty of voluntary manslaughter and using a firearm during a felony and fixing her punishment at ten years in Virginia State Penitentiary for manslaughter and one year for the use of a firearm.

Subsequent to the filing of a presentence report and a hearing on said report, the judge entered judgments on January 14, 1977, fixing the defendant's punishment at ten years in the penitentiary, with five years being suspended, for the manslaughter and one year for the firearm charge.

B. Facts

During the afternoon of July 24, 1976, the defendant received several telephone calls from her estranged husband, Fred Smith, who sounded intoxicated in the last call.

Later, at approximately six (6) p.m., Mr. Smith came to the defendant's apartment and knocked on the door. Before opening the door, the defendant ascertained that the caller was her estranged husband, who was prohibited by Court Order from harming, threatening or annoying her, and from entering into her place of residence or frequenting or loitering in that vicinity. She refused him entrance and threatened to call the police if he persisted. He replied that she could call the police. While she was calling the operator to contact the police, he kicked the door down, breaking the lock and chain off the door, and entered the apartment; he immediately approached Mr. Wilson C. Vincent, a fellow employee and dinner guest of the defendant, and physically attacked him.

Defendant then called the Portsmouth Police declaring that her estranged husband had broken into her apartment and was killing a guest. She also attempted to obtain help from a neighbor, who in turn, telephoned the police reporting that a fight was occurring in defendant's apartment, defendant had a gun, and a gunshot had just been fired in the apartment.

When the first police officers arrived on the scene, they heard a gunshot fired in the apartment complex. Upon their approach of defendant's apartment, they observed a man (later identified as Mr. Vincent) in the doorway; on entering they spotted the defendant, who stated "he's dead; I shot him".

Defendant testified that when Mr. Smith broke in he said "you're are both as good as dead". While the fight was taking place, she grabbed a gun off the sofa belonging to Mr. Vincent, a hospital security guard, fired two warning shots, and eventually fired one shot in Mr. Smith's direction as he was getting off Mr. Vincent, who at the time was not moving.

Other evidence adduced at trial showed that: (1) the deceased's blood-alcohol test revealed a .21 per cent (T.70); he was a violent man when he drank (T.102); he drank alot and the marriage between the defendant and Mr. Smith was replete with fights.

Over the objection of defense counsel, several instructions were given to the jury; over objection several other instructions were refused or altered (see discussion infra).

After the jury was instructed and was considering its verdict, a hearing was held in chambers wherein two witnesses told the judge and counsel that one Commonwealth witness had allegedly perjured herself during the trial. According to Mr. and Mrs. Service, Mrs. Catherine Smith had lied in open Court regarding her statements that Fred Smith had not been drinking on the day he died and he had not threatened Mr. Vincent's life. Defense counsel moved for a mistrial on the basis of perjured testimony and the allegation that the threat had been passed on to Commonwealth's Attorney's office prior to trial, but was not revealed to defense counsel even though he had moved for production of all exculpatory evidence in the Commonwealth's possession.

The motion for a mistrial was denied.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN ALTERING INSTRUCTION NUMBER 12 AND IN REFUSING TO GRANT INSTRUCTIONS NUMBERED 7, 16 AND 18.

The defendant, by counsel, respectfully submits that the trial court committed reversible error in altering instruction 12 and in refusing instruction 16 and 18.

Instruction 12, as submitted by defense counsel, stated:

> The Court instructs the jury that justifiable homicide is a killing of a human being in the necessary or apparently necessary defense of oneself or close friends from great bodily harm, apparently attempted to be committed by force or in defense of home, property or person against one who apparently endeavors by violence or surprise to commit a felony or either.

Although this instruction was supported by the evidence and case law, e.g., Green v. Commonwealth, 122 Va. 862, 871 (1918), the trial Court struck the words, 'home, property or" and "or either" from the instruction.

In addition, the court refused to allow these instructions:

Instruction 7 -

> "The Court instructs the jury that a person does not have to retreat or flee from anyone when they are defending their homes and may use such force."

Instruction 16 -

> "A person has the right to use reasonable force, and if necessary, to kill another who manifestly intends and endeavors by violence or surprise to commit a felony on her."

Instruction 18
"A person has the right to use reasonable force, and if necessary, to kill another who manifestly intends and endeavors by violence or surprise to commit a felony aginst any habitation."

These two stock instructions were supported by the evidence; however, as with the altering of Instruction 12, the Court below would not allow this law to reach the jury. The main reasons for the Courts action were apparently the views that Mr. Smith could break and enter his estranged wife's apartment with legal impunity and that once he was inside the apartment the defense of habitation was not available to the defendant.

At common law husbands and wifes were held criminally liable for crimes committed against each other. Husband & Wife, 41 Am. Jur. 2d, §s 4. But the common law did not recognize crimes committed against the property of a husband or wife committed by the other spouse. Id. see also, State v. Weitzel, 112 Ohio App. 300, 168 N.E. 2d 550, 551 (1960) (a husband cannot steal from his wife or burglarize his wife's home).

Yet, by statute, as the Married Women's Acts (e.g., Va. Code §§55-35, et seq.), the property rights of married women have been upheld against the husband's marital claims. See e.g., Vigilant Ins. Co., 197 Va. 216, 226 (1955). Thus, a husband can be held as a criminal trespasser upon his wife's lands. Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924).

Whether burglary is considered a crime against property or against the person, it would seem that today a husband can indeed be found guilty of burglary of his wife's

residence. Since burglary is often termed an offense against possession of property, not ownership of the property, whether the wife rents an apartment or a house or owns her residence should not control. See, e.g. Bradley v. State, 244 Ind. 630, 195 N.E. 2d 347, 349 (1964); 12 C.J.S., Burglary, §s 26, p. 685.

The "old" common law cases like State v. Weitzel, supra, are predicated upon the logic that since a wife's property is actually her husband's, the husband cannot steal from himself or break into his own house or apartment. The policy behind the Married Women's Act has vitiated this reasoning. Here, the facts of the apartment being in defendant's name alone, the injunction against Mr. Smith, and Fred Smith, was not given a key by Mrs. Smith to enter, all negate any marital consent to enter by a real or constructive co-owner. Compare, Balletti v. State, 261 So. 2d 510 (Husband with key, therefore, his wife consented to his entrance or of the entrance of his agents).

Of course, the equal protection guarantee of the Fourteenth Amendment of the United States Constitution also nulifies the old common law view allowing the husband immunity with reference to her property rights.

On the view that once Fred Smith was in the apartment, the evidence clearly showed that he was not under control but had assaulted Mr. Vincent. The court below felt the defense of habitation extended beyond the entrance of the place of habitation if the intruder was not under control (T. 145-146). In Fortune v. Commonwealth, 133 Va. 669, 688 (1922), and Pierce v. Commonwealth, 135 Va. 635, 641 (1923), the courts seemed to take contradictory views

on how far the defense of justifiable homicide goes once one has broken the 'thresh-hold of the habitation. Even if the Pierce view that only in extreme cases involving danger to life or danger of great bodily harm will homicides be justified, the evidence manifested both of these circumstances with a man prohibited by court order from entering a habitation who breaks in, who says he will kill both occupants and who proceeds to attack one of them in a very violent manner.

Now, the judge below disallowed any real defense of habitation instruction to be given to the jury and such constituted reversible error because it denied the defendant a right to offer a valid defense under the instant evidence and the law. With this defense the jury could have returned a verdict of not guilty. It is respectfully submitted that this error was, therefore, not harmless and cannot be proven to be so beyond a reasonable doubt.

2. THE JUDGMENT REGARDING USING A FIREARM DURING THE COMMISSION OF A FELONY WAS CONTRARY TO THE LAW, PARTICULARLY IN CONTRAVENTION TO THE DOUBLE JEOPARDY GUARANTEES.

In light of the provisions in the United States Constitution and the Virginia Constitution prohibiting the placing of one in double jeopardy for the same offense, defendant submits she was unlawfully convicted of the same offense twice under the circumstances.

Here, the jury found the defendant guilty of voluntary manslaughter which meant under the circumstances that under sudden excitement and upon adequate provocation she killed Mr. Smith by a gun. Yet, the statute on using a firearm during the

commission of a felony as applied herein necessary included the same criminal elements. Both included the use of an instrumentality causing the death and both included the other elements consistent with the crimes since by the terms of the firearm statute it requires the use of a firearm during a felony. The felony here was the alleged homicide. Thus, the facts necessary to convict on the first charge were also present on the second charge (use of a firearm); this renders a bar to conviction for the second offense. See Miles v. Commonwealth, 205 Va. 462, 467 (1964); Rogers v. Commonwealth, 201 Va. 507, 511 (1960); Whitton v. State, 479 p. 2d 302 (Alaska 1970).

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Albert L. Fary, Jr.

Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 2370

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Phyllis Ann Smith vs. Commonwealth of Virginia were deposited to Anthony Troy, Acting Attorney General for the Commonwealth of Virginia, Virginia State Supreme Court Building, Broad Street, Richmond, Virginia, on the 2ND day of December, 1977.

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

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Respondent

PETITION FOR WRIT OF CERTIORARI TO
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Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 23704

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704
Counsel for Petitioner

Anthony Troy, Esquire
Acting Attorney General for the
Commonwealth of Virginia
Virginia State Supreme Court Building
1101 Broad Street
Richmond, Virginia
Counsel for Respondent

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND on Thursday the 8th day of September, 1977.

The petition of Phyllis Ann Smith, sometimes known as Phillis Ann Smith, for a writ of error and supersedeas to the judgment rendered by the Circuit Court of the City of Portsmouth on the 14th day of January, 1977, in a prosecution by the Commonwealth against the said petitioner for felonies (Indictment No. 28117 - Counts 1 and 2), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

Record No. 770644

A Copy,

Teste

Howard G. Turner,
Clerk

By:
Richard R Bunch

Deputy Clerk

Supreme Court, U. S.
FILED
MAR 2 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

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PHYLLIS ANNE SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

There is no reported Opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Certiorari set forth in petitioner's Appendix.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is it a denial of the equal protection of law or violation of due process of law or both for a Virginia state court to take the view that a husband can violate his estranged wife's property rights without impunity, thus denying her the right to defend her property from invasion by the husband?

2. Whether the instruction on the applicable Virginia statutes regarding the use of a firearm was a violation of the double jeopardy guarantee.

STATEMENT OF THE CASE

For thirteen years, the marital relationship between Fred and Phyllis Smith was replete with fights in which they heaped both physical and mental abuse on each other. In early July, 1976, the petitioner moved into an apartment. Her frequent guest in her new apartment was Wilson Vincent, a fellow employee. In fact, the relationship between the petitioner and Mr. Vincent became so intimate that he often stopped by her apartment to rest while he was in transit between his two jobs.

Mrs. Smith had a ten-year-old daughter who was exposed to this complicated relationship. At the time of this incident the petitioner had consented to allow her estranged husband to have custody of their daughter, at her daughter's request. Transcript 157.

On the afternoon of July 24, 1976 Fred Smith, the deceased, made several telephone calls to the apartment of the petitioner telling her of his love for her and requesting a reconciliation. On the last phone call the petitioner hung up on him. Within an hour of the last call the deceased went to petitioner's apartment.

When he arrived the petitioner was entertaining Mr. Vincent. In the heat of anger, the deceased and Mr. Vincent

got into a fight in which the deceased began choking Mr. Vincent. The deceased was not armed at any time.

While they were fighting, the petitioner got Mr. Vincent's gun from under the cushion of the sofa and fired two warning shots into the air. After the first shot, a neighbor came to her door and the petitioner asked the neighbor to summon help. Transcript 242.

During the time that the deceased was choking Mr. Vincent the petitioner did not fire any shots at the deceased or in his direction. As the deceased began to arise from the fight with Mr. Vincent, the petitioner shot him in the back. He had not turned around or made any advances in the direction of the petitioner. The petitioner then called an ambulance and went over to the deceased and felt for a pulse. Transcript 243.

When the police arrived, Mr. Vincent having regained consciousness and the petitioner were standing in the middle of the floor. At this time, she pointed to the deceased and told the policeman, "He's dead; I shot him." Transcript 41.

In conversation with her family on the day after the shooting, the petitioner told him she was glad to be rid of the deceased and that she was glad that she would not have to live any more like she had lived for the past thirteen years. Transcript 93.

ARGUMENT AGAINST THE GRANTING OF WRIT OF CERTIORARI

I.

Petitioner's Claims Are Not Properly Before This Court.

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of

state court decisions. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that State courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra,* and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California,* 401 U.S. 797 (1971). To the same effect see *Rugendorf* v. *United States,* 376 U.S. 528 (1964).

When a comparison is made of the issues raised in the Supreme Court of Virginia with all of those being raised in this Court, it becomes apparent that petitioner is raising issues for the first time. A review of the errors assigned and argument present to the Virginia Supreme Court clearly reveals that at no time was the Virginia Supreme Court called upon to determine whether the trial court's denial of the instructions offered violated the petitioner's right to equal protection of the law. Likewise, no contention of denial of equal protection was submitted by petitioner to the trial court below.

The Virginia Supreme Court has consistently held that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:21, Rules of the Supreme Court of Virginia; *Clarendon House* v. *Helfert,* 213 Va. 28, 189 S.E.2d 331 (1972); *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E.2d 309 *cert. den.* 403 U.S. 936 (1970). See also *Wainwright* v. *Sykes,* ..... U.S. ....., 97 S.Ct. 2497 (1977).

In *Beck* v. *Washington,* 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon the issue this Court held that "[t]his point is not properly before this Court. Although both opinions of the Washington Supreme Court discussed the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute." 369 U.S. at 549, 550.

The Commonwealth submits that the Virginia Supreme Court has never been called upon to determine the constitutional challenge. In petitioner's appeal to the Virginia Supreme Court no equal protection claim was raised. Consequently, an issue of constitutional dimension is not properly before this Court, and this Court should not exercise jurisdiction over such an issue when the Virginia Courts have not passed upon them and there is no adequate record before this Court upon which to decide the issues raised.

II.

Jury Instructions Are Matters Of State Law And Present No Substantial Federal Question.

The respondents submit that jury instructions are matters of state law and that unless a substantial federal question is presented, this Court should not entertain this Petition for Certiorari. A similar issue was raised in *Moore* v. *Illinois,* 408 U.S. 786, 799 (1972) concerning admissibility of evidence. This Court held in that case that admissibility of evidence was not subject to review by the federal court. Similarly, in the case at bar, the instructions to the jury are matters of state law which should not be the subject of review in

this Court. See also *Robinson* v. *California*, 370 U.S. 660, 669 (1972).

In *Cupp* v. *Naughten*, 414 U.S. 141 (1973), this Court considered an instruction used in Oregon dealing with credibility of witnesses and whether the instruction violated the defendant's right to remain silent. The Court held that:

> "[B]efore a federal court may overturn a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 414 U.S. at 146.

The Court went on to say that the issue in such cases is "whether the aim of the instruction so infected the entire trial that the resulting conviction violates due process." 414 U.S. at 147. The respondent respectfully submits that the instructions given in this case were not violative of petitioner's rights, nor was the entire trial so infected that the conviction violated due process. Likewise the failure of the trial court to grant requested instructions did not infect the entire trial so as to violate due process. In *Henderson* v. *Kibbe*, ... U.S. ....., 97 S.Ct. ....., 52 L.Ed.2d 203 (1977) complaint was made that the Court failed to instruct the jury properly. The Court held

> "[A]ccordingly we reject the suggestion that the omission of more complete instructions on the causation issue 'so infected the entire trial that the resulting conviction violated due process.' Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." 52 L.Ed.2d at 214.

The respondent respectfully submits that whether the instructions given were erroneous, or the Court improperly denied valid instructions, that the petitioner's trial was not so infected as to violate due process.

III.

The Instructions Given Did Not Violate Petitioner's Right To Equal Protection Of Law.

The petitioner contends that she was entitled to an instruction:

> "The Court instructs the jury that justifiable homicide is a killing of a human being in the necessary or apparently necessary defense of oneself of close friends from great bodily harm, apparently intended to be committed by force or in defense of home, property, or person against one who apparently endeavors by violence or surprise to commit a felony or either."

The Court deleted certain parts and gave substantially that which was requested. In Virginia, instructions must be based upon the evidence. *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845, *cert. den.* 425 U.S. 994 (1975). In the case at bar, the petitioner got substantially what was requested in this instruction based upon her theory of the case. Moreover, the law in Virginia on the amount of force to be used in self-defense cases is set out in the case of *Bausel* v. *Commonwealth*, 165 Va. 669, 181 S.E. 453 (1905):

> "the owner [of a dwelling] may resist the entry [of another upon his dwelling], but has no right to kill, unless it is rendered necessary to prevent loss of life or great bodily harm. If he kills where there is not a reasonable ground of apprehension of an imminent danger to his person or property, it is manslaughter. . ." 165 Va. at 688.

The respondent submits that the facts do not support the refused Instructions 7, 16, and 18. The facts do not show that the petitioner was defending her home as requested in Instruction 7, nor was anyone attempting to commit a felony upon her as requested in Instruction 16, nor was anyone attempting to commit a felony upon her habitation as requested in Instruction 18. See *Fortune* v. *Commonwealth,* 133 Va. 669, 112 S.E. 861 (1922), and *Bailey* v. *Commonwealth,* 200 Va. 92, 104 S.E.2d 28 (1958).

The petitioner has argued that she was denied equal protection of the law because the Court held that the husband could act with impunity versus the wife's property and not be held accountable. The Court made no such holding. The Court only ruled with respect to the evidence presented which instructions it would allow. The Court denied the instructions because they were not warranted by the evidence presented.

IV.

A Conviction Of Manslaughter And Use Of A Firearm In The Commission Of A Felony Do Not Violate The Petitioner's Right Against Double Jeopardy.

It is the position of the petitioner that her conviction and sentences for both manslaughter and use of a firearm during the commission thereof are in violation of her Fifth Amendment right not to be "subject for the same offense to be put in jeopardy of life or limb." Amendment V, United States Constitution.

In Virginia and most states the standard for determining whether offenses are being "the same" is the "same evidence test" adopted by this Court in *Blockburger* v. *United States,* 284 U.S. 299 (1932). The test is that if each offense requires

proof of an element which the other does not, the offenses are not the same. It is also recognized that to support a claim of double jeopardy it must be shown that the offenses were the same in law *and* in fact. See *United States* v. *McCall,* 489 F.2d 359 (2nd Cir. 1973); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir.) *cert. den.* 429 U.S. 844 (1976). In other words, the defendant may be convicted of two separate offenses arising from a single act or transaction as long as each offense requires proof of a fact which the other does not. *Pereira* v. *United States,* 347 U.S. 1 (1954); *Gavieres* v. *United States,* 220 U.S. 338 (1911).

In a similar case to the one at bar, *Jones* v. *Commonwealth,* 218 Va. 18, 235 S.E.2d 313 (1977), the Supreme Court of Virginia held that robbery by means of a firearm and use of a firearm in the commission of a felony were different crimes for purposes of double jeopardy. The Virginia Court in applying the "same evidence test" compared the elements of robbery in Virginia and the elements of use of a firearm to commit a felony and concluded as a matter of *law,* even though they may have common elements as a matter of fact, are separate and distinct offenses for double jeopardy purposes. The elements in the crime of robbery by use of a firearm are more similar to the crime of using a firearm in the commission of a felony than is manslaughter.

In Virginia "where death ensues on a sudden provocation, or a sudden quarrel, without malice prepense, the killing is manslaughter." *Clark* v. *Commonwealth,* 90 Va. 360, 368, 18 S.E. 440 (1893). See also *Moxley* v. *Commonwealth,* 195 Va. 151, 157, 77 S.E.2d 389 (1953), *Byrd* v. *Commonwealth,* 89 Va. 536, 16 S.E. 727 (1893). In order to be convicted of manslaughter no weapon need be used. The gist of manslaughter is killing in the heat of passion or sudden provocation. Use of a firearm in the commission of

a felony requires different proof for a conviction than does manslaughter.

Petitioner's contention is a familiar one in the realm of similar federal statutes. 18 U.S.C. § 924(c) concerns the use or carrying of firearms in the commission of a federal felony, and at least six Circuit Courts of Appeals have declared that it creates a crime separate and distinct from the underlying felony. *United States* v. *Howard,* 504 F.2d 1281 (8th Cir. 1974); *United States* v. *Ramirez,* 482 F.2d 807 (2d Cir.), *cert. den.* 414 U.S. 1070 (1973); *United States* v. *Crew,* 538 F.2d 575 (4th Cir.), *cert. den.* 429 U.S. 852 (1976); *Perkins* v. *United States,* 526 F.2d 688 (5th Cir. 1976); *United States* v. *Dixon,* 558 F.2d 919 (9th Cir. 1977); *United States* v. *Sudduth,* 457 F.2d 1198 (10th Cir. 1972).

Congressional intent to prevent the carrying and use of firearms in the commission of federal felonies was of prime importance to the court in *United States* v. *Sudduth, supra,* in deciding that 18 U.S.C. § 924(c) created a separate crime. It is beyond question that the intent of the General Assembly of Virginia was to create, by way of § 18.2-53.1 Code of Virginia (1950) as amended, a separate crime, the gist of which is the use of a firearm in situations where it is particularly likely that weapons may be used to injure victims, law enforcement officers or bystanders. The very terms of the statute make the intent clear: "Violation of this section [§ 18.2-53.1] shall constitute a separate and distinct felony."

More importantly, several courts have held that simultaneous convictions and sentences under 18 U.S.C. § 924(c) and the federal armed bank robbery statute, 18 U.S.C. § 2113(a, d) do not violate the double jeopardy clause of the Fifth Amendment. *United States* v. *Crew, supra; Perkins*

v. *United States, supra; United States* v. *Hearst,* 412 F. Supp. 877 (N.D. Cal. 1976); *United States* v. *Grant,* 549 F.2d 942 (4th Cir. 1976), *cert. den.* 53 L.Ed.2d 1081 (1977). By comparison of the elements of the crimes in 18 U.S.C. § 924(c) and 18 U.S.C. § 2113(a, d) these courts concluded that conviction and sentencing for both crimes does not constitute double jeopardy. It was by the same process that the Virginia Supreme Court decided in *Jones* v. *Commonwealth, supra,* that conviction and sentencing for robbery and use of a firearm in a felony do not constitute double jeopardy, as discussed above.

The respondent respectfully submits that the law is clear that the crime of robbery and the crime of use of a firearm in the commission of a felony are separate and distinct offenses, *a fortiori,* manslaughter and the use of a firearm in the commission of a felony are separate and distinct offenses.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Thomas D. Bagwell, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 28th day of February, 1978, I mailed with first class postage prepaid a true copy of this Respondent's Brief in Opposition to Granting of Certiorari to Albert L. Fary, Jr., Esquire, 218 London Boulevard, Portsmouth, Virginia 23704, and J. Wayne Sprinkle, Esquire, 704 Professional Building, 505 Washington Street, Portsmouth, Virginia 23704.

THOMAS D. BAGWELL
Assistant Attorney General